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MEMORANDUM FOR MR. McGEORGE BUNDY
THE WHITE HOUSE

In accordance with your request to Mr. Chayes on September 7, submitted herewith is a paper entitled "International Law Problems of Blockade," embodying the views on this question of the Legal Adviser's office.

/s/ E. S. Little

William H. Brubeck
Executive Secretary

Date: 4/8/92

Enclosure

As stated.

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September 10, 1962

MEMORANDUM FOR MR. McGEORGE BUNDY

FROM: Abram Chayes

SUBJECT: International Law Problems of Blockade

This memorandum is in response to your telephone request of Friday afternoon, September 7, 1962. In order to get it to you as soon as possible we have not circulated it to other offices which may be interested in the subject matter. It is therefore to be regarded as embodying the current views of this office rather than a considered Department position.

SUMMARY

1. A traditional blockade, giving rise to the legal right to interfere with neutral commerce, could not be invoked against Cuba, because we are not in a state of war with Cuba.

2. A "pacific blockade" would likewise seem inapplicable under the present circumstances, since it may be justified only as a reprisal designed to secure reparation for and thus proportionate to a specific international wrong committed by the blockaded State. It is difficult to specify plausibly such a wrong in the existing situation, especially in view of the defensive character of the military assistance currently being supplied to Cuba. In any event, "pacific blockade" does not give the blockading force the right to seize and sequester neutral vessels; indeed, the United States has maintained that it gives no legal right to divert neutral commerce.

3. "Pacific blockade" must be reconciled with obligations undertaken in the Inter-American system and under the United Nations Charter. The Rio treaty prohibits unilateral intervention of any kind except in case of armed attack. While the concept of armed attack undoubtedly includes some room for an anticipatory response, the factual situation would have to be much more threatening than the one presently existing. Multilateral action to blockade Cuba could be taken pursuant to the OAS Charter by a two-thirds vote of the OAS membership. The imposition of a multilateral blockade by the OAS may be "enforcement action" by a regional organization subject to Security Council veto under Article 53 of the United Nations Charter. Moreover, a blockade, whether unilaterally or multilaterally imposed, would probably be a use or threat of force prohibited under Article 2(4) of the United Nations Charter, unless justified as individual or collective self-defense under Article 51. Such justification involves an analysis generally comparable to that concerning armed attack set forth above.

Since a "pacific blockade" would involve forcible interference with bloc and possibly NATO commerce, it should not be undertaken without prior consultation within the Alliance. This would be especially true if it were to be justified as a defensive measure against a potential threat of force by Cuba, for in such case the North Atlantic Treaty imposes an obligation to consult.

4. In the strict sense, even bloc shipping would be exempt from a pacific blockade according to the position the United States has traditionally maintained. This position could plausibly be elaborated, however, to cover shipping of nations aligned with the blockaded one. Special problems would be raised if it were sought to maintain the blockade against ships of NATO countries. Both legal and political problems would grow more intense as the blockade proceeded from interference with unarmed merchantmen carrying military supplies to interference with troop ships carrying technicians to interference with any convoying naval vessels.

A. Customary International Law

1. General Principles

The law of blockade is to be viewed in the perspective of the general rule of freedom of the seas, to which it affords a narrowly limited legal exception. The universally accepted principle of freedom of the seas provides the broadest rights of unmolested navigation to ships of all flags traveling on the high seas. Under this principle, these waters remain open as an international highway for communication and commerce and no individual nation may exercise authority therein except within the limits prescribed by international law. It follows that vessels on the high seas are under the jurisdiction of the flag State and are not normally subject to the exercise of authority by any other State.

The regime of freedom of the seas is recognized by all civilized nations, but it has been particularly espoused and guarded by the great maritime nations. The United States has been zealous in its defense from the beginning of the Republic. Our first foreign wars were fought in defense of its principles. In World War I, British invasion of the freedom of the seas brought us close to armed action against British naval vessels. The culminating cause of United States entry into the war was the resumption of unrestricted submarine warfare against neutral commerce by the Germans.

2. Traditional Blockade

Blockade, in its traditional form, is one of the rare cases in which interference with the maritime commerce of one nation by another is formally sanctioned by international law. Blockade, in this traditional sense, is a military action taken in the course of a war. The essential condition of a legal blockade is that the blockading State and the blockaded State be at war. In a state of war, of course, the belligerent nations may sink or capture each other's shipping. When a valid blockade is established, the authority of the blockading power extends to the ships of neutral countries as well. Offending ships and their cargoes may be seized by the blockader and the seizure will be enforced in a prize court.

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To establish a valid blockade the blockading nation must isolate an enemy port or coastline from the high seas so as to cut off all enemy traffic with it. The blockade must be "effective" that is, it must be maintained by a force sufficient in general to prevent access to the blockaded ports. It must be applied impartially to ships of all flags. Notice must be given to neutral commerce.

These formal rules of blockade were worked out in their final form in the 19th century. With the advent of new naval and coastal weapons in more recent times, it became impossible to impose the "close in" blockade to which those rules were adapted. At the same time, the economic aspects of warfare assumed increasing importance. As a result, the 20th century has seen a good deal of interference with neutral commerce during hostilities when the conditions of legal blockade were not met.

Nevertheless, the United States has continued to insist upon the established legal doctrine when her own interests were infringed, and in particular upon the conditions of belligerency and effectiveness. Thus, in both the Spanish Civil War in the 1930's and the Chinese Civil War in the 1940's, the United States refused to recognize blockades of insurgent ports by the recognized government since a formal state of war did not exist.

The United States reaction to British interference with neutral shipping in World War I has already been noted. The Germans declared the waters around the British Isles a war zone and proclaimed that neutral ships in that area would be exposed to danger. The British by way of reprisal announced that they would prevent commodities of any kind from reaching Germany. They enforced this proclamation by detaining all ships carrying goods of presumed enemy destination, ownership or origin and requiring these cargoes to be discharged in allied ports in the custody of the prize court. These actions were repeated in 1939. The United States opposed these measures as interference with neutral vessels on the high seas by a belligerent power without the justification of a recognized belligerent right. The measures clearly were not consistent with the technical requirements of the law of blockade as generally accepted prior to World War I. Some legal commentators have suggested that the measures adopted by the British in World War I and II "in the form of reprisals and aimed at economic isolation

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of the opposing belligerent must be regarded as a development of the latent principle of the law of blockade." II Oppenheim, International Law 796 (7th ed. Lauterpacht 1952). It is to be noted, however, that the British Government did not justify its action as a legal blockade, but as a reprisal against the earlier unlawful acts of the Germans in seeking to divert neutral shipping from British ports. The United States never recognized the validity of the British acts.

3. "Pacific Blockade"

Naval powers have, in a substantial number of cases, blockaded ports of nations with whom they are at peace, the so-called "pacific blockade". Such a blockade has been said to be a measure short of war, in the sense that the blockading State does not intend war to result and the blockaded State acquiesces without going to war. If this acquiescence does not occur, the blockade ceases to be "pacific", for there is no question that it is a hostile act that may be and often has been treated as an act of war.

The concept of "pacific blockade" grew up in the 19th century as a specific instance of the more general category of forcible measures of redress known as "reprisal". Thus, it was not justified unless the blockaded State had committed an international wrong toward the blockading State. Like other forms of reprisal, pacific blockade could not legally be resorted to before exhaustion of peaceful avenues for settlement of the grievance. Moreover, it was subject to the broad limitations that the reprisal should not be disproportionate to the provocation and should be terminated when reparation was secured.

Since the blockaded power has, by hypothesis, committed a legal wrong, its shipping can be interfered with by the "pacific blockade". The consequences for the vessels of third parties are less certain. There is substantial unanimity that the seizure and sequestration of ships of nations not parties to the controversy are not legally justified in a pacific blockade. In addition the United States has consistently denied the legitimacy of any actions by the blockading country preventing access to the blockaded ports by neutral ships. Thus when Great Britain, Germany and Italy imposed a pacific blockade on Venezuela in 1902, the United States protested that there was no right to interfere with vessels flying the United States flag. The blockading powers yielded to this view and asserted that their blockade "created ipso facto a state of war" and gave them belligerent rights.

A commentator has summarized the historical experience with the statement that although a pacific blockade may be effective when applied by a powerful nation against a weak nation, it is obviously not designed for use between two powerful naval States. In practice the pacific blockade has been used only by powerful maritime nations against States unable to muster a substantial retaliatory force.

4. The Cuban Situation

In considering the application of these broad concepts to the Cuban situation today, the first thing to be noted is that on the state of facts as presently known neither traditional blockade nor pacific blockade would seem to be justified. Since we are not at war with Cuba, the basic condition for a valid belligerent blockade is absent.

Cuba has, of course, committed international wrongs against the United States for which we could take reprisals -- for example, the expropriation of assets owned by United States nationals. In an earlier day, acts of this kind may have been the occasion for sending out the gunboats, but there would be general agreement today that pacific blockade would be disproportionate and otherwise inappropriate to this kind of legal wrong. Moreover, to justify blockade now in terms of expropriative acts taken some years ago would be disingenuous to say the least. Finally, problems arise of our own obligations as to the threat or use of force under the United Nations Charter and various Inter-American treaties. These are discussed in more detail below.

As to the recent Soviet activities in supplying Cuba with military equipment and personnel, it is difficult to argue that they involve an international wrong by Cuba. The President has stated that the arms are defensive. If this is so, the assistance is very much like what we are giving to many nations throughout the world and we would not wish to take a position which might undercut the legal validity of these programs. It would be especially detrimental to suggest that intelligence-gathering facilities, radar and tracking equipment, even if manned by Russians, are in any way legally suspect. We have a strong interest in preserving the principle that it is wholly legitimate for one State to observe another from outside the territorial jurisdiction of the observed State.

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Of course, Soviet military activities and assistance of this kind in the Western Hemisphere are inconsistent with the Monroe Doctrine, but the scope of action that would be justified under the Doctrine in any given set of circumstances is obscure because the character of the Doctrine as a legal basis for action is not clearly established in international law and practice. Moreover, authority for unilateral action under the Doctrine must be taken as severely modified by the Inter-American treaty system, in any case.

Cuba's acceptance of such Soviet assistance violates her own obligations as a member of the Inter-American system. This is clear from the treaties themselves as well as the series of pronouncements of Inter-American organs culminating with the suspension of Cuban membership in the system at Punta del Este. But the Inter-American treaties themselves, particularly the Rio treaty, establish the procedures to be followed in case of breaches of this kind.

B. Treaties

1. Inter-American Treaties

a. Unilateral Action - The Inter-American treaty system imposes severe limitations on unilateral action by one American State against another. Article 15 of the Charter of the Organization of American States states these limitations in their most comprehensive form: "No State or group of States has a right to intervene directly or indirectly for any reason whatsoever in the internal or external affairs of any other State." This provision covers both the use of armed force and other forms of unilateral interference or threats against American States.

Article 3 of the Rio Treaty does provide, however, for unilateral action in self-defense against armed attack upon any American State. The article does not require that a State must wait until an attack upon it is already in progress. There is a certain undefined leeway to respond to imminent or threatened attack. But the present situation in Cuba, characterized by the President as a purely defensive build-up, could not be brought within the most expansive reading of the armed attack concept. Indeed, the United States could hardly begin to make a plausible argument that it was faced by a threat of armed attack from Cuba unless the character and scale of Soviet military assistance were sharply altered in the direction of establishing an effective

offensive

offensive capability based on Cuba. Even then, the specific circumstances of each case -- especially those bearing on the magnitude of the threat, the particular American State at which it is directed, and its imminence in time -- must be considered in determining whether a pacific blockade is justified and in deciding upon procedures for implementation.

In all but the most urgent of cases, advance consultation with the OAS would seem to be called for at a minimum. If time factors precluded such consultation, under the Rio treaty, the OAS consultative machinery would nevertheless come into operation after the event, looking towards installation of the pre-conflict status quo.

In the last analysis, of course, the determination as to what is required in the United States national interest is for this Government to make. Such a determination should take into account, however, the fact that the political costs of any course of action will depend in considerable measure on the persuasiveness with which it can be justified in terms of international law.

b. Multilateral action - In all cases of aggression or conflict other than armed attack, it is obligatory that the matter be presented to the Inter-American Organ of Consultation for agreement among its members on measures to be taken. Under Article 25 of the OAS Charter, collective action by the Organization may be taken, upon a two-thirds vote of the membership, when an American State has been threatened by any form of aggression or conflict or by any other fact or situation that might endanger the peace of the Americas. The collective action authorized by the article undoubtedly includes "pacific blockade". There too, the "fact or situation" upon which action is posited need not directly involve the United States but may affect any American State.

However, under Article 53 of the United Nations Charter, "no enforcement action shall be taken...by regional agencies without the authorization of the Security Council." Since the OAS is such a regional organization, the Security Council would seem to have a veto over action of the Organization imposing a "pacific blockade" if this were to be characterized by the Council as "enforcement action".

Neither the concept of enforcement action nor the procedural interrelation between the Security Council and regional organizations has been much clarified in United Nations practice. When the OAS imposed diplomatic and economic sanctions against the Dominican Republic in 1960, the USSR made an effort to bring this action before the Security Council for approval under Article 53. The United States took the position that no such approval was necessary, since the sanctions did not amount to "enforcement action"

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within the meaning of Article 53. This position was supported by the resolution finally adopted in the Security Council. More recently, a similar attempt was made to subject the OAS action at Punta del Este to Security Council review. In this case the Security Council refused to take any action whatsoever, thus implicitly adopting the United States position that no enforcement action was involved. It is obvious, however, that if a blockade of Cuba were to be called for by the OAS it would be much closer to application of military force than any of the instances heretofore considered and therefore more readily thought of as enforcement action. Perhaps some of these difficulties could be reduced by careful drafting of an OAS resolution.

On the procedural side, it is probably the case that a Security Council resolution seeking to treat action by a regional organization as enforcement action within Article 53 would be subject to veto by a permanent member of the Security Council.

2. United Nations Charter

The limitations contained in the Inter-American treaties are re-enforced by those of the Charter of the United Nations. In Article 2(4), Members of the United Nations undertake an obligation to refrain from the threat or use of force against the territorial integrity or political independence of any State. While some indefinite threats of force, such as Khrushchev's missile rattling, may not be considered as falling within the scope of this commitment, it would be difficult to argue effectively that a naval blockade is not a use of force or a threat of force. Blockade explicitly threatens the use of naval force at least against merchant vessels of the blockaded power unless the requirements of the blockade are complied with.

Article 51 of the Charter preserves the inherent right of individual or collective self-defense against an armed attack. In this context, the term "armed attack" has substantively the same elements as it has in the Inter-American treaty system. Indeed, the Charter of the Organization of American States makes specific reference to Article 51 of the United Nations Charter in discussing armed attack.

Regardless of the legal niceties, if a "pacific blockade" were to be imposed upon Cuba in the present circumstances, whether on a unilateral or collective basis, it is certain that the matter would be brought before the United Nations immediately on a charge that it was a threat to the peace. A charge of this nature would be extremely difficult to deal

with

with both politically and legally. Even if we could protect ourselves in the Security Council by the use of the veto, we would nevertheless be faced with the prospect of action in the General Assembly which would not be subject to veto. Even among our allies, those whose maritime tradition is strong, the United Kingdom and Norway, for example, might well consider their own interests demanded that they support the traditional freedom of the seas. If they were not in active opposition, we would nevertheless lack their wholehearted support. The danger of resort to this kind of action when the interests of the Western Alliance are split was dramatically illustrated in the Suez Canal incident.

3. NATO

In view of the fact that a blockade is a use of force in the North Atlantic area, sound alliance practice alone would dictate prior consultation in NATO. Moreover, since presumably the justification for a pacific blockade of Cuba would be that the peace and security of the United States have been threatened, the United States would be obligated under Article 4 of the North Atlantic Alliance to consult with the other parties to that agreement.

If the United States builds its case upon an imminent armed attack, our NATO allies would seem obligated to take supporting action on the basis of Article 5 of the North Atlantic Treaty. Failure to do so would tend to discredit our own position.

C. Operational Problems

If a pacific blockade were confined to Cuban ships we would have no difficulty in remaining within the traditional scope of this doctrine. However, we are concerned with materiel the bulk of which is entering Cuba in Bloc, Yugoslav and NATO vessels. The conventional rule authorizing interference with the blockaded State's shipping could arguably be extended to the ships of its allies. Bloc States are not formal allies of Cuba, but given the facts of international alignment in today's world, the doctrine might conceivably be stretched another notch to cover Bloc shipping.

Use of the armed-attack theory, within the scope of the doctrine of reprisals, would presumably require the blockade

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to be confined in general to military cargoes. It may be assumed that these would be carried primarily, if not exclusively, in Soviet or other Bloc merchant vessels. To make the blockade operationally effective all ships of such countries would have to be stopped and searched for the prohibited cargo.

If the blockade were to be expanded to other shipments -- for example, aviation fuel -- this would entail the prospect of stopping and searching Yugoslav and NATO tankers and merchantmen with increased difficulties both from the legal and political standpoint. The NATO powers would undoubtedly protest any such action unless they had agreed to the cessation of such shipments to Cuba and to the imposition of the blockade.

Even a blockade imposed only on Bloc shipping, would be made much more complicated if extended to troop ships carrying "technicians". Finally, if, as is not unlikely, the USSR begins convoying its merchant ships, we will be faced with a wholly new problem. The question whether the United States will open fire in time of peace on a Russian naval vessel on the high seas poses legal and political issues far beyond those involved in a "pacific blockade" of merchant shipping.